



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 21, 1998

Mr. John A. Riley
Director, Litigation Support Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-1289

Dear Mr. Riley:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114134.

The Texas Natural Resource Conservation Commission ("the TNRCC") received a request for information concerning Elf Atochem North America, Inc. ("Elf Atochem"). You state that the TNRCC has provided the requestor with some information that is responsive to the request. However, you assert that other responsive information is excepted from disclosure pursuant to sections 552.103, 552.107, 552.108, and 552.110 of the Government Code. You submitted representative samples of the records to this office for review, marked to show the exceptions asserted.¹ Those records are marked as Attachments C, D, and E.

You assert that the information in Attachment C is excepted from disclosure under section 552.103(a) as attorney work product, and also section 552.107(1) of the Government Code. You state that Attachment C contains enforcement records that are "attorney notes and strategy documents" and that the information also relates to settlement negotiations. In Open Records Decision No. 647 (1996), this office addressed the scope of protection under the Open Records Act for attorney work product. We explained that section 552.103(a) provides an exception for information relating to pending or anticipated litigation, including attorney work product. *Id.* at 2. However, the governmental body must demonstrate the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

applicability of section 552.103(a) by showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to the litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

We also discussed the Open Records Act exceptions in connection with attorney work product once civil litigation has concluded and section 552.103(a) is no longer applicable. Open Records Decision No. 647 (1996) at 3. We stated that, once litigation has concluded, section 552.111 excepts from disclosure attorney work product that was created in anticipation of civil litigation and consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). However, in order to show the applicability of section 552.111, the governmental body has the burden of explaining to this office how (1) the information was created in anticipation of civil litigation under the test set forth in *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993), and that (2) the information at issue consists of or tends to reveal the attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996).

You have not explained the applicability of either section 552.103(a) or section 552.111 to the records submitted as Attachment C. Thus, Attachment C is not protected from disclosure under either section 552.103 or 552.111. However, we will address your assertion that Attachment C is protected from disclosure under section 552.107(1) of the Government Code.

Section 552.107(1) protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. *See* Open Records Decision No. 574 (1990). However, section 552.107(1) does not provide a blanket exception for all communications between clients and attorneys or all documents created by an attorney. It excepts only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1; 574 (1990) at 3; 462 (1987) at 9-11. Section 552.107 does not except from disclosure a "basically factual recounting of events." Open Records Decision No. 574(1990) at 5. It also does not except from disclosure "the attorney's mere documentation of calls made, meetings attended or memos sent . . . if no notes revealing the attorney's legal advice or the client's confidences are included." *Id.* We have marked the information in Attachment C that may be withheld from disclosure under section 552.107(1).

You argue that the documents in Attachment D are protected from disclosure pursuant to section 552.108 of the Government Code, which provides:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

You assert that the Special Investigations Unit of the TNRCC is a law enforcement agency whose records are protected under section 552.108. This agency has not previously held that TNRCC is a law enforcement entity whose records are protected under section 552.108, nor do we agree with your argument that the Special Investigations Unit is a law enforcement agency whose records are generally protected under section 552.108. Thus, Attachment D may not be withheld from disclosure based upon your argument that the Special Investigations Unit is a law enforcement agency under section 552.108.

We note that records of criminal investigations conducted by governmental agencies may be withheld from disclosure under section 552.108 in certain situations. This office has held that section 552.108 may be invoked by the proper custodian of information, even if not a law enforcement agency, if the records concern an investigation that may lead to the filing of criminal charges or prosecution of criminal conduct. Open Records Decision No. 474 (1987) at 4-5. However, you do not argue that the records are excepted from disclosure on this basis. We also note that if other governmental entities, such as law enforcement agencies or prosecutors, have interests that may be implicated by release of these records, these entities should assert to this office their interest in protecting this information from disclosure. *See* Open Records Decision No. 586 (1991).

Also submitted to this office were records from Elf Atochem, labeled as Attachment E. Pursuant to section 552.305 of the Government Code, the TNRCC has not taken a position on whether any of these documents are confidential, but asks this office to determine whether the submitted records are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office notified Elf Atochem of the request for information. Elf Atochem responded by asserting that the records at issue in Attachment E are protected trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

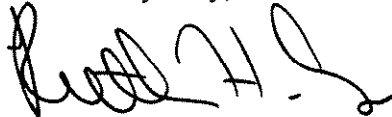
RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.

RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

The Attachment E documents are process descriptions and process diagrams. Elf Atochem states that this information is provided to employees on a need-to know basis only, that the company has strict non-disclosure policies concerning the information, and that the security measures used by the company to protect their process information includes secured facilities that are closed to all non-Elf Atochem employees. Attorneys for Elf Atochem state that if any of the process documents are disclosed to third parties with whom Elf Atochem is involved in litigation, the company takes legal steps to restrict disclosure to the scope of the relevant litigation and to ensure that there is no further distribution of the information. The company also states that it has taken all possible steps to protect from public disclosure information provided to the government during enforcement proceedings. We agree that Elf Atochem has met its burden of showing that Attachment E records are confidential trade secrets.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

RHS/ch

Ref: ID# 114134

Enclosures: Submitted documents

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